STATE OF MICHIGAN
IN THE SUPREME COURT

IVAN FRANK, an individual, JEFFREY DWOSKIN, an individual, PHILLIP D. JACOKES, an individual, ROY KRAUTHAMER, an individual, BLAKE ATLER, an individual, MATT KOVALESKI, an individual, JAMES BRUNK, an individual, IJF HOLDINGS, L.L.C., a limited liability company,

Plaintiffs-Appellees,

v.

DANIEL GILBERT, an individual, JOSHUA LINKNER, an individual, BRIAN HERMELIN, an individual, GARY SHIFFMAN, an individual, DAVID KATZMAN, an individual, ARTHUR WEISS, an individual, JAY FARNER, an individual, CAMELOT-ePRIZE, L.L.C, a limited liability company, BH ACQUSITIONS, L.L.C, a limited liability company, CRACKERJACK, L.L.C. f/k/a/ ePRIZE, L.L.C., a limited liability company, CRACKERJACK HOLDINGS, L.L.C., f/k/a ePRIZE HOLDINGS, L.L.C., a limited liability company, jointly and severally,

Defendants-Appellants.

MSC Case No. 151888
COA Case No. 318751
LC Case No. 13-133554-CB
Hon. Colleen O'Brien

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COUNTER-STATEMENT OF JURISDICTION

Defendants' Jurisdictional Statement is complete and correct.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I.

Should this Court affirm the Court of Appeals' holding that MCL 450.4515(1)(e) is a statute of limitations, where guidance from the United State Supreme Court, precedent from this Court, and persuasive case law from the Court of Appeals and numerous federal courts, dictate that because MCL 450.4515(1)(e)'s operation is dependent on a claim having already accrued, the plain language of the statute creates two alternative limitations periods – a three-year limitations period based on accrual, and a two-year limitations period based on discovery of such accrual - and is therefore a statute of limitations?

Plaintiffs say yes.

The Court of Appeals says yes.

ePrize Defendants say no.

II.

Should this Court affirm the Court of Appeals' holding that under the facts of this case, Plaintiffs' claim for member oppression under MCL 450.4515 accrued in 2012 when Plaintiffs sustained definable and ascertainable harm at the time Defendants liquidated the company and wrongfully distributed its assets?

Plaintiffs say yes.

The Court of Appeals says yes.

ePrize Defendants say no.

COUNTER-STATEMENT OF FACTS

I. Background of the ePrize Businesses

A. ePrize, LLC

ePrize, LLC was founded in 1999 by Defendant Joshua Linkner ("Linkner"), who was its principal owner, and, until 2010, its CEO. (App 53b, 90b). The company specialized in online sweepstakes and interactive promotions. Over the years, ePrize, LLC grew into a valuable corporate asset, due in large part to the hard work and commitment of the Plaintiffs, all of whom were employees of the company. (App 117b–149b). During their employment, the Plaintiffs acquired ownership units in ePrize, LLC, as it was "standard practice" to issue stock to employees in all levels of the company in the early days of the business. Thus they became minority members. (App 66b). After the sale of ePrize in August 2012, the name of the company was changed to Crackerjack, LLC.

B. ePrize Holdings, LLC

In 2005, Defendant Linkner and a new investor in the business, Defendant Camelot-ePrize, LLC – owned by Defendants Gilbert and Katzman – made the decision to force the employee-owners (i.e., Plaintiffs) out of ePrize, LLC and into a newly formed company called ePrize Holdings, LLC, because, as Linkner testified, it was, for some unarticulated reason, "preferential to have fewer shareholder[s]" in the company. (App 69b). In turn, the only asset owned by ePrize Holdings was its ownership of units in ePrize, LLC. (*Id.*, pg. 170). As explained more fully below, the Defendants caused the units of ePrize Holdings in ePrize, LLC to become subordinated to the units in ePrize, LLC. The ePrize LLC Units were subsequently issued by the Defendants to themselves through a series of unaudited, undisclosed, and self-interested transactions. (*See generally* App 2b-8b). These self-interested transactions were

negotiated without the benefit of a valuation, which would have ensured that ePrize, and its members, received a fair deal. (App 85b-86b; App 33b, ¶¶ 11, 16).

Notwithstanding Defendants' contention in the Trial Court that Plaintiffs' ownership was effectively transferred to ePrize Holdings, the record established that this transfer may not have actually happened and is in question. Specifically, Plaintiffs obtained a document in discovery stating that each Plaintiff remained on the books as owning units in ePrize, LLC after 2005, when their ownership was *allegedly* transferred to ePrize Holdings, LLC. (App 150b).[1] Defendant Linkner testified that this document did in fact appear to list the ownership in ePrize, LLC, and, thus, it would have included all of the Plaintiffs. Yet, he then backtracked on this admission. (App 80b-81b).

II. Overview of the Parties

A. The Plaintiffs-Appellees – Employees and Minority Members

The Plaintiffs are all former employees of ePrize, LLC and minority members of ePrize, LLC and/or ePrize Holdings, LLC. (App 40b-47b, 117b-149b). Although there is a question of fact whether the original ownership of the Plaintiffs in ePrize LLC was effectively transferred to ePrize Holdings, there is no dispute that Plaintiffs do in fact own minority interests in one or the other of the ePrize companies. (*Id*). Each of the Plaintiffs submitted an Affidavit in connection with their personal knowledge of the facts of this case and a description of their membership interests. (*Id*). In those unrebutted Affidavits, they describe the promises and agreements that Defendant Linkner made to and with them in connection with their ownership interests. Specifically, their interests would remain immune from dilution and subordination, and they would receive *pro rata* distributive shares upon any sale of the company. The company was sold,

[1] It is not in dispute that this document was created *after* the formation of ePrize Holdings, LLC, as shown by the fact that Gilbert did not invest in ePrize until 2005, and he is listed as the largest owner of the company. (App 67b-68b).

but the Plaintiffs did not receive the promised distributions. (*Id*). Each of the Plaintiffs further attested that material information was withheld from them with respect to the breach of these agreements, the dilution, and the sale which ultimately rendered their ownership interests worthless and damaged them. (*Id*).

B. The Defendants-Appellants – Managers and Members in Control of ePrize

Most of the Defendants – Gilbert, Camelot e-Prize, Linkner, Hermelin, Shiffman, Katzman, Weiss, Farner, and BH Acquisitions – have all been Managers of ePrize, LLC, and have effectively been in control of the company at all relevant times.[2] (App 9b-12b, ¶¶ 56-86). Defendant Linkner was the sole manager of ePrize Holdings, LLC and was in control of that company. (*Id.*, ¶ 58). As set forth in the Second Amended Complaint, these Defendants controlled the ePrize business, directed and controlled the dilution and subordination schemes as well as the 2012 liquidation, and have liability on Plaintiffs' count for member oppression. (App 1b-30b).

III. The Dilution and Subordination Scheme; Self-Dealing by the ePrize Managers

Between 2007 and 2009, the ePrize managers carried out a series of undisclosed and unaudited self-interested transactions which would, in August 2012, culminate in damages to the Plaintiffs. (App 1b-8b, ¶¶ 3-49). This scheme is described in detail in the un-rebutted expert Affidavit of Thomas Frazee, which analyzed the facts alleged in the Second Amended Complaint and established that there were substantial questions of fact to be litigated. (App 33b-39b).

More specifically, in 2007, the Company borrowed approximately $17 million pursuant to the creation of three separate debt issuances with convertible debt features. (App 34b, ¶ 5a). The majority of the money was borrowed from the interested ePrize Managers and their affiliates

[2] Defendants dispute that Defendant Gilbert was ever a manager of ePrize; however, Meeting Minutes from May 1, 2006 state that he was indeed a manager of the company. (App 152b). Again, this raises a question of fact as to the fiduciary obligations of Mr. Gilbert.

– the Defendants in this case. (*Id*). The interest rate on the notes correlating to these loans was at 10% per annum, and the notes were due at the end of 2008. (*Id*).

In 2008, as the notes were coming due, ePrize, LLC borrowed $11.6 million from an affiliated (and undisclosed) limited liability company called "ePrize Priority," which was owned by certain of the defendant-managers of ePrize, LLC and their affiliates. (App 35b ¶ 5b). This time, the undisclosed interest rate was a far more aggressive 20% per annum, compounded quarterly. The notes on this transaction were to be due on July 31, 2009. (*Id*) In addition to the interest rate, ePrize Priority received 3 million "priority" – as the name of the company implies – equity units in ePrize, LLC. (*Id*). Ultimately, in 2009, all of the 2007 and 2008 debt would be converted by Defendants into various "Series B" Units, which would have a liquidation preference over the already existing Units in the company, including those owned by the Plaintiffs and ePrize Holdings. (App 36b, ¶ 8).

In March 2009, the company issued a final series of Units – "Series C." (App 35b, ¶¶ 5c, 6). These Units carried with them a liquidation preference that allegedly entitled the holders to receive the first $69.3 million of the equity proceeds received in a sale of the company. (App 35b, ¶ 6a). Mr. Frazee describes the complex nature of these preferential units and their attributes in his Affidavit. (*Id*, ¶¶ 6a-b). The Series C Units were offered and sold to various investors – primarily the defendant-managers – for slightly less than $4 million. (App 36b, ¶ 7a).

At the time when these massive preferences were being created at the direction of the Defendants, the economic impact could not have been, and was not, known to the Plaintiffs. Nor could the harm that would result from them be discerned in any manner. (App 34b, ¶ 5). With the exception of Plaintiff Ivan Frank, whose standing in the company is discussed more fully below, none of the Plaintiffs had been given the opportunity to purchase any of these preferred units, and the implementation of this subordination and dilution scheme was **not disclosed**. This

is despite the fact that the Plaintiffs held ownership interests in the ePrize business. (Exs 3, 6-11). Moreover, even with respect to Mr. Frank, material information was withheld regarding the consequences of these transactions. (App 45b, ¶¶ 33-38).

IV. Plaintiffs Incurred Harm and Their Claims Accrued When the Company Was Sold in August 2012 and Defendants Distributed $100 Million to Themselves, Rendering Plaintiffs' Shares Worthless

By August 2012, all of the Plaintiffs had ceased to be employed by ePrize, but they still retained their ownership units in the companies. (App 40b-47b; App 117b-149b). Unbeknownst to them, however, the Defendants were in the process of negotiating the sale and liquidation of the company assets. Ultimately, the Defendants agreed to sell the company to a third party for $140 million, and, on August 20, 2012, the papers were signed and the deal was closed. (App 1b-3b, ¶¶ 5-7). Thereafter, with ePrize flush with cash, the Defendants paid debts of about $40 million and then distributed the net proceeds - $100 million - mainly to themselves. It was not until distributions were actually made that the returns on investment, which the Defendants had put in place for themselves, were reaped. These distributions, rates of return, and disparities in distribution between majority and minority ownership are oppressive (with all but one Plaintiff receiving zero) and give rise to this cause of action. (App 7b).

Plaintiffs' forensic expert concludes that the $4 million that the Series C investors paid for their Units resulted in a total payout of $67 million, which represents at least a *1,500 percent rate of return* over a 3.5 year period. (App 36b, ¶ 9). In addition, the evidence further shows that the specific rates of return for the individual Defendants are at a lottery-like *1,723 percent*:[3]

[3] The data in this chart are from documents produced by the Defendants. (See App 154b; App 155b).

Defendant-member	Series C Investment	Distribution from August 2012 Sale	Rate of Return
J. Linkner	$563,138	$9,701,298	1,723%
G. Shiffman	490,163	8,444,145	1,723
A. Weiss	27,231	469,119	1,723
Camelot-ePrize	731,535	12,602,317	1,723
B. Hermelin	338,748	5,835,683	1,723
D. Katzman	260,885	4,494,331	1,723
Totals[4]	$2,411,700	$41,546,893	1,723%

Plaintiffs learned of these rates of return only upon receiving documents from Defendants pursuant to statutory demands to inspect corporate books and records, under MCL 450.4503, in 2013. Plaintiffs' claim for member oppression under MCL 450.4515 did not accrue, and Plaintiffs did not sustain definable and ascertainable harm, until the company was sold, and these rates of return and distributions were made. (App 3b-4b, ¶¶ 5, 10, 12; see generally App 33b-39b).

V. Plaintiff Ivan Frank's Position in the ePrize Business and His Ownership Interests

Plaintiff Frank was an employee in top management of ePrize from 2001 to 2010. (App 40b, ¶¶ 1-3). During his tenure with the company, he came to own approximately 1% of the business, holding voting and non-voting units in both ePrize, LLC and ePrize Holdings, LLC. (App 40b-41b, ¶¶ 4-9). Mr. Frank acquired this mix of shares over time and had several discussions with Defendant Linkner regarding his ownership interest in the business. In these discussions, as well as discussions with the other Plaintiffs, Defendant Linkner repeatedly promised and agreed that Mr. Frank's overall ownership in the ePrize business **would never be diluted** by future investments and that he would receive a *pro rata* share of any sale of the company, based on his entire ownership interest. (App 41b-43b, ¶¶ 11-22). These promises and

[4] The totals in this table are based on the Series C offering alone.

agreements induced Mr. Frank to continue working hard for the business – 70 to 80 hours per week – and accept lower compensation. (App 41b-44b, ¶¶ 10, 26-29). This clear-cut agreement not to dilute Plaintiffs is itself actionable as a breach of contract.

A. Mr. Frank's Acquisition of Series C Units

In 2009, Defendant Linkner offered, and indeed "encouraged," Mr. Frank to purchase the new class of "Series C" Units. (App 45b, ¶ 34). When the offer was made to Mr. Frank, he was already the owner of Units in ePrize Holdings, LLC, which he continues to own to this day. (App 40b, ¶ 5). During the time period when the Series C Units, and other preferred Units, were being offered, Mr. Linkner again repeatedly promised that Mr. Frank's other Units would never be diluted, and would never be subordinated to new investors. (App 46b, ¶ 43).

Ultimately, in April 2009, Mr. Frank, who already owned 950,000 Units of the business in other classes, purchased the Series C Units. (App 45b, ¶ 34). In connection with the offering and purchase, Mr. Frank was provided with no financial data, valuations, or other material that would even remotely suggest that his other Units would be so subordinated that they would one day be rendered worthless upon a liquidation event, contrary to Mr. Linkner's agreements. (App 44b, ¶ 26).

Even though Mr. Frank was a voting member of ePrize, LLC, he never received a copy of the Fifth Operating Agreement. As Mr. Frank explains in his Affidavit, he never received a copy, and he never signed the document. (App 45b, ¶ 38). The record reflects that Mr. Frank never signed the Fifth Operating Agreement. (App 107a).

As part of the Series C subscription documentation, Mr. Frank did sign a document entitled "Member Signature Page to Fifth Amended and Restated Operating Agreement." (App 152a). However, this document is incomplete. The document that Mr. Frank signed provides that the Fifth Amended and Restated Operating Agreement is "attached as Exhibit B thereto."

However, when the reader turns to "Exhibit B," it states, "ePrize Operating Agreement [*see attached*]," but nothing is attached. (App 126a). Therefore, that document cannot be made part of the document that Mr. Frank signed, and, in turn, Mr. Frank cannot be held to have signed that document.

Accordingly, there was simply no meeting of the minds of all members as to the Fifth Operating Agreement. "A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind." *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 548 (1992). "Contractual liability is consensual. A basic requirement of contract formation is that the parties mutually assent to be bound." *Rood v Gen Dynamics Corp*, 444 Mich. 107, 118 (1993). Here, the referenced document was never given to or seen by Mr. Frank.[5]

B. Mr. Frank Ceases His Employment With ePrize

In 2010, Mr. Frank left his employment at ePrize. (App 46b, ¶ 44). When he left, ePrize and Mr. Frank signed a "Separation Agreement and General Release." (App 153a). The terms of this document do not address in any way Mr. Frank's ownership interest in the ePrize businesses; rather, it relates solely to the terms of his termination of employment and severance. (*Id*). As part of his separation from the company, and in exchange for this severance pay, the

[5]Pursuant to MCL § 450.4102(2)(r), an "Operating Agreement" is defined as a written agreement "between *all* members of the limited liability company." (Emphasis added). Since at least one member did not sign the Operating Agreement as is required by the statute, it cannot be binding. Accordingly, for purposes of determining an appropriate distribution upon the sale of the company, there is, at the very least, a question of fact as to whether the distribution was to be made pursuant to the unexecuted Fifth Operating Agreement, or, more appropriately, *pro rata* to all of the members pursuant to MCL § 450.4303. This, in pertinent part, provides that distributions in the absence of an operating agreement must be "in equal shares to all members." Therefore, if the Fifth Operating Agreement is not binding and in effect, then the distribution was required to be made "in equal shares to all members." Here, there is a blank space for Mr. Frank's signature in the Fifth Operating Agreement, and, therefore, it was not fully executed and not binding.

Agreement contains a general *employment* release. (App 40b, § 6). The severance had nothing to do with Mr. Frank's ownership interest, and it was based on "a compromised amount of the past due bonuses owed to [Mr. Frank]." (App 46b, ¶ 44).

The release language in the Separation Agreement is also limited to claims "arising *prior to* the time the respective parties sign this Agreement," which was in March 2010. (App 153a, § 6) (emphasis added). Thus, the plain language of the release precludes its application here, where the claims arose in August 2012 when ePrize was sold. The release does not affect Mr. Frank's ownership interest in the company in any manner, and it was related solely to claims that would have arisen out of the employment relationship. (App 46b, ¶¶ 45-48). There is no need to tender back consideration, because the Separation Agreement does not pertain to the claims here.

C. The Sale of the Business and Wrongful Distribution

As with all of the other Plaintiffs, in 2012, after the fact, ePrize notified Mr. Frank that the company had been sold to a third party. (App 46b, ¶ 50; App 117b-149b). Prior to that time, Mr. Frank had not received any notice that the company was being sold or that his ownership and distributive rights would thereby be affected, and he had no opportunity to participate in negotiations (App 47b, ¶ 50). At that time, while he received a distribution based on the Series C Units ***only***, Mr. Frank received ***nothing*** on his other 950,000 Units. (*Id*, ¶ 55). It is undisputed that the distribution made to Mr. Frank after the 2012 sale was based solely on his Series C Units Indeed, after the 2012 sale, Mr. Franks' other 950,000 Units were rendered ***entirely worthless***. Mr. Frank did not execute any documents, nor was he involved in any way, with respect to the sale of the company in 2012. Mr. Frank and the other Plaintiffs challenge the 2012 sale, wrongful distribution, and dilution down to zero, **while Defendants reaped $100 million**. (App 1b-30b, *Defs' Brf*, p 7).

SUMMARY OF THE ARGUMENT

The Court of Appeals' published opinion in this matter comprehensively and correctly addressed the issues at hand, given the allegations in this case, the language of the relevant statutes, and the import of the controlling case law. (App 39a). Thereafter, Defendants moved for reconsideration (App 156b) making the same arguments they make now – and which the Court of Appeals correctly denied. (App 197b).

First, the Court of Appeals correctly held that MCL 450.4515 is a statute of limitations, not a statute of repose.

MCL 450.4515(1)(e) is not a statute of repose, but a statute of limitations. The distinctive feature of a statute of repose is that it prevents a cause of action from *ever* accruing when the injury is sustained after the designated statutory period has elapsed. A statute of limitations, on the other hand, prescribes the time limits in which a party may bring an action that has *already accrued*. Because its operation is dependent on a claim having already accrued, the plain language of MCL 450.4515(1)(e) does not create a statute of repose that prevents a claim from ever accruing. Rather, it creates two alternative limitations periods – a three-year limitations period based on accrual, and a two-year limitations period based on discovery of such accrual. This is supported by United States Supreme Court guidance, Michigan Supreme Court precedent, and persuasive authority from the Michigan Court of Appeals and several federal courts applying Michigan law.

Had the Legislature intended MCL 450.4515(1)(e) to be a statute of repose, it would have used language to indicate that the time begins to run at some point *other than* when the plaintiff's cause of action accrues. Instead, the Legislature included very specific and unambiguous language that focuses on accrual and the plaintiff's cause of action.

The Court of Appeals was not bound by the *Baks* decision. First, *Baks* was decided prior to the 2002 LLC Amendments to MCL 450.4515 which added section (1)(e), and is therefore irrelevant to the analysis. Indeed, *Baks* was decided even before the 2001 Amendments to 450.1489, which added the comparable provision in the Michigan Business Corporation Act (BCA). Second, *Baks* is inapplicable dicta. *Baks* merely commented that the limitations period in an analogous statute was one of repose. "[T]he central issue of that case [*Baks*] . . . [was] whether MCL 450.1489 created an independent cause of action for shareholder oppression claims. The relevant time period – imported from a different section of the BCA – had nothing to do with this determination" (App 39a, *Frank v Linkner,* 310 Mich.App. 169; 871 N.W.2d 363). The Court of Appeals was not bound by the "repose" dictum in the *Baks* decision.[6]

Second, Plaintiffs' claims accrued in August 2012. Pursuant to MCL 600.5827[7] and this Court's precedent,[8] a claim does not accrue for statute of limitations purposes until a plaintiff actually incurs definable and ascertainable harm. In this case, the Plaintiffs did not suffer definable and ascertainable harm or incur any damage at all until the Defendants liquidated the ePrize companies and sold them for $140 million to a third party, then collected for themselves $100 million in corporate distributions at an exorbitant and entirely unfair rate of return, while the Plaintiffs received nothing on their subordinated membership interest.

Not until the ePrize companies and Plaintiffs' interests were devalued, in August 2012, did Plaintiffs incur actionable injury to sustain their claim for member oppression under MCL 450.4515(2). That claim is based on a "continuing course of conduct" or a "series of actions" that

[6] As this Court held in *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 436-37; 506 NW2d 816 (2008), "A statement that is dictum does not constitute binding precedent under MCR 7.215(J)." This Court further explained, "Obiter dictum is defined as . . . a judicial opinion in a matter related but not essential to the case." *Id* (internal citations omitted).
[7] This controlling statute was disregarded by the Trial Court.
[8] *See, e.g., Moll v Abbott Laboratories*, 444 Mich 1, 11; 506 NW2d 816 (1993).

substantially interfered with the Plaintiffs' interests as members. Before 2012, Plaintiffs' membership units had value, the business was alive and well. Thus, a claim by them based on a continuing course of oppressive conduct, entitling them to a statutory buy-out and damages, would have been entirely speculative. Accordingly, the accrual date for purposes of the statute of limitations can only be August 2012, and there is no period of limitations that can conceivably bar the claims. At the very least, there was a question of fact as to the accrual date.

Even if Plaintiffs' claims accrued in 2009, which they did not, Defendants' fraudulent concealment toll the limitations period under MCL 450.4515(1)(e), because, as described, MCL 450.4515 is a statute of limitations.

Here Defendants contend that some component of equitable relief ancillary to Plaintiffs' member oppression claim theoretically could have accrued in 2009. That is incorrect. But even if true, any request for equitable relief under MCL 450.4515(1)(a)-(d), including a buy-out, carries a *six-year* statute of limitations.

ARGUMENT

Plaintiffs note that Defendants briefed the factual accrual issue first (i.e, when the plaintiffs' cause of action accrued), and the statutory issue second (i.e., whether MCL 450.4515(1)(e) constitutes a statute of limitations, a statute of repose, or both). However, Plaintiffs have reversed the order in which Defendants briefed the issues for two reasons: (1) Plaintiffs wish to follow the order specified in this Court's Order, dated February 3, 2016; and (2) the issue of the nature of the statute (whether the statute is one of repose, limitations, or both) logically precedes the factual issue of when Plaintiffs' cause of action accrued, assuming it is a statute of limitations.

I. MCL 450.4515(1)(e) is a Statute of Limitations

For the first time on appeal, Defendants contend that MCL 450.4515(1)(e) is *both* a

statute of limitations and a statute of repose. The relevant provision reads:

> (e) ….An action seeking an award of damages must be commenced within 3 years after the cause of action under this section has accrued or within 2 years after the member discovers or reasonably should have discovered the cause of action under this section, whichever occurs first. MCL 450.4515(1)(e).

In particular, Defendants allege that the first phrase of the sentence ("An action seeking an award of damages must be commenced within 3 years after the cause of action under this section has accrued") is a statute of repose, and that the second phrase ("…or within 2 years after the member discovers or reasonably should have discovered the cause of action under this section") is a statute of limitations. (*Defs' Brf*, p 26).[9]

While it is possible that a statute may consist of both periods of limitation and periods of repose,[10] MCL 450.4515(1)(e) is not such a statute; it is solely a statute of limitations. Under Michigan law, the Court must give effect to the unambiguous language of the statute.[11] The first part of MCL 450.4515(1)(e) creates a three-year limitations period that does not begin to run *until the plaintiff's claim has accrued*. The second part of the provision reduces the limitations period to two years if the plaintiff discovers, or should have discovered, that the cause of action exists. However, the cause of action does not exist if it has not yet accrued.[12]

The distinctive feature of a statute of repose is that it prevents a cause of action from ever accruing when the injury is sustained after the designated statutory period has elapsed.[13] A statute of limitations, on the other hand, prescribes the time limits in which a party may bring an

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[9] Defendants incorrectly state that "***An action for minority oppression*** 'must be commenced within 3 years…'" (*Defs' Brf*, p 26). The actual, explicit, unambiguous language of the statute reads: "***An action seeking an award of damages*** must be commenced within 3 years…" MCL 450.4515(1)(e).

[10] It would seem anomalous for the legislature to include a statute of limitations and a statute of repose in the same sentence without clearly differentiating between the two.

[11] *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000).

[12] See MCL 600.5827; *Stephens v Dixon*, 449 Mich 531, 534; 536 NW2d 755 (1995).

[13] *Sills v Oakland General Hosp,* 220 Mich App 303; 559 NW2d 348 (1996).

action that has already accrued.[14] Because its operation is dependent on a claim having already accrued, the plain language of MCL 450.4515(1)(e) does not create a statute of repose that prevents a claim from ever accruing. Rather, it creates two alternative limitations periods – a three-year limitations period based on accrual, and a two-year limitations period based on discovery of such accrual.

Thus, section 4515(1)(e) is not a statute of repose, but a statute of limitations. And, since the erroneous and discredited *Baks* holding upon which Defendants rely to the contrary was in error, and in fact applied to a different statute, this Court is free to properly interpret the statute that actually applies to this case and hold that it is not a statute of repose. Accordingly, fraudulent concealment applies, and, even if the claim is held to have accrued in 2009 (which it did not), the allegations of fraudulent concealment toll the statute.

A. Standard of Review

Issues of statutory construction are reviewed de novo on appeal. *Cruz v State Farm Mut Auto Ins Co,* 466 Mich 588, 594; 648 NW2d 591 (2002).

B. The United States Supreme Court has Discussed, in Detail, How to Determine Whether a Particular Statute is One of Limitation or Repose

In the recent case of *CTS Corp v Waldburger*, 134 SCt 2175 (2014), *reh'g denied,* 135 S Ct 23 (2014), the United States Supreme Court discussed, in detail, how a court can determine whether a particular statute is a statute of limitations or a statute of repose.

First, the Court clarified that, while statutes of limitations and statutes of repose are similar in some ways, there are important differences. *CTS Corp*, 134 S Ct at 2182 ("the time periods specified are measured from different points, and the statutes seek to attain different purposes and objectives."). Statutes of limitations are identified as follows:

[14] *Id.* at 308.

> In the ordinary course, a statute of limitations creates ***"a time limit for suing in a civil case, based on the date when the claim accrued."*** Black's Law Dictionary 1546 (9th ed. 2009) (Black's); see also *Heimeshoff v. Hartford Life & Accident Ins. Co.,* 571 U.S. ——, ——, 134 S.Ct. 604, 610, 187 L.Ed.2d 529 (2013) ("As a general matter, a statute of limitations begins to run when the cause of action ' "accrues" '—that is, when 'the plaintiff can file suit and obtain relief' " (quoting *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., Inc.,* 522 U.S. 192, 201, 118 S.Ct. 542, 139 L.Ed.2d 553 (1997))). Measured by this standard, a claim accrues in a personal-injury or property-damage action "***when the injury occurred or was discovered.***"

Id. at 1282. (Emphasis added).

In other words, the hallmark of a statute of limitations is that the time limit is based on the date that a claim has accrued. A statute of repose, on the other hand:

> …puts an outer limit on the right to bring a civil action. ***That limit is measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant***. A statute of repose "bar[s] any suit that is brought after a specified time since the defendant acted (such as by designing or manufacturing a product), even if this period ends before the plaintiff has suffered a resulting injury." Black's 1546. ***The statute of repose limit is "not related to the accrual of any cause of action; the injury need not have occurred, much less have been discovered."***

Id. at 2182-83. (Emphasis added.) In defining the statutes in this way, the Court made clear that statutes of limitations depend on "accrual," whereas statutes of repose are not related to accrual or discovery in any way. *Id.* at 2178 ("Statutes of limitations are designed to promote justice by encouraging plaintiffs to pursue claims diligently ***and begin to run when a claim accrues***. Statutes of repose effect a legislative judgment that a defendant should be free from liability after a legislatively determined amount of time ***and are measured from the date of the defendant's last culpable act or omission.***"). (Emphasis added.)

The Court's guidance is clear: Statutes of limitations begin to run ***when a claim accrues***. Statutes of repose begin to run ***from the date of the defendant's last culpable act or omission***. Statutes of repose are not concerned with whether a plaintiff has a cause of action, when a plaintiff's claim accrues, or when a plaintiff discovers a cause of action. Applying these

principles to MCL 450.4515(1)(e), there is no doubt that this entire provision is a statute of limitations.

C. Michigan Case Law Supports *Waldburger*'s Interpretive Principles and the Court of Appeals Correctly Applied These Principles

In *Miller-Davis Co v Ahrens Const, Inc*, 489 Mich 355, 802 NW2d 33, 35 (2011), this Court reviewed two statutes: MCL 600.5807(8)[15] and MCL 600.5839(1).[16] The Court expressly stated that MCL 600.5807(8) is a statute of limitations, and that MCL 600.5839(1) is a statute of repose. The Court explained:

> We agree with plaintiff that MCL 600.5839(1) does not apply to actions for breach of contract. MCL 600.5807(8) is the applicable statute. The limitations period in both statutes is six years. ***But unlike the period in MCL 600.5839(1), which runs from "the time of occupancy of the completed improvement, use, or acceptance of the improvement," the limitations period in MCL 600.5807(8) runs from the date the "claim first accrued...."***

Id. at 358. The Court's analysis is consistent with the U.S. Supreme Court's interpretation in *Waldburger*. MCL 600.5807(8) is a statute of limitations because it runs from the date the claim first accrued; whereas MCL 600.5839(1) is a statute of repose because it runs from the time of

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[15] "The period of limitations is 6 years for all other actions to recover damages or sums due for breach of contract." MCL § 600.5807(8).

[16] "(1) A person shall not maintain an action to recover damages for injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective or unsafe condition of an improvement to real property, or an action for contribution or indemnity for damages sustained as a result of such injury, against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or against any contractor making the improvement, unless the action is commenced within either of the following periods: (a) Six years after the time of occupancy of the completed improvement, use, or acceptance of the improvement. (b) If the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor or licensed architect or professional engineer, 1 year after the defect is discovered or should have been discovered. However, an action to which this subdivision applies shall not be maintained more than 10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement." MCL 600.5839(1).

the defendant's last culpable act, i.e., the time of occupancy, use, or acceptance of the completed improvement. As one state court phrased the distinction, a statute of repose's "limitation period is initiated by the ***defendant's 'last act or omission'*** that at some ***later point gives rise*** to the plaintiff's cause of action…***The time of the occurrence or discovery of the plaintiff's injury is not a factor*** in the operation of a statute of repose." *Christie v Hartley Const, Inc*, 367 NC 534; 766 SE2d 283, 287 (2014).

The Court of Appeals has similarly interpreted statutes of limitations and repose in the same way as the *Waldburger* Court. For example, in *Abbott v John E Green Co*, 233 Mich App 194, 592 NW2d 96, 102 (1998), the Court of Appeals considered MCL § 600.5839(1), a statute of repose. Plaintiffs argued that the amendments to the statute did not apply to plaintiffs' cause of action; therefore, the Court was required to determine when the amendments to the statute took effect. Subsection (6) of the statute stated that the amendments applied to plaintiffs whose causes of action accrued as of the Act's 1985 effective date, not, as plaintiffs argued, when "the completed improvement was occupied, used, or accepted" (the words of the statute of repose). As such the Court held that the amendments to the statute did apply to plaintiffs, and the statute of repose in subsection 1 barred their claims. The Abbott Court made clear, however, that while it used "accrual" language to determine *when* the amendments to the statute came into effect, this had no bearing on the statute of repose itself:

> Our decision today should not be misinterpreted as suggesting that the statute of repose begins running when a cause of action accrues. The statute of repose begins running at "the time of occupancy *or* use *or* acceptance" of the improvement, *Beauregard–Bezou v. Pierce,* 194 Mich.App. 388, 393, 487 N.W.2d 792 (1992) (emphasis in original), without regard to when a plaintiff's cause of action accrues under *Connelly.*

Id. at 102. This is consistent with the Supreme Court's guidance in *Waldburger,* which clarified that accrual language does not apply – and indeed, does not matter – to statutes of repose.

The Court of Appeals further clarified this distinction in *Pukke v Hyman Lippitt, PC*, 2006 WL 1540781 (Mich App June 6, 2006). In *Pukke*, the Court interpreted MCL 451.810(e),[17] which reads:

> A person may not bring an action under subsection (a)(2) more than 2 years after the person, in the exercise of reasonable care, knew or should have known of the untruth or omission, but in no event more than 4 years after the contract of sale. MCL 451.810(e).

The *Pukke* Court held that this statute was both a statute of repose *and* a statute of limitations. Specifically, "[t]he language precluding a party from bringing an action under subsection (a)(2) more than four years after the contract of sale is a statute of repose ***as it contains an express period for filing an action***." *Id.* (Emphasis added). On the other hand, "the language precluding a party from bringing a cause of action more than two-years ***after the party knew or should have known*** about the untruth or omission is a statute of limitation ***as it prescribes a time limit during which an action that has already accrued may be filed***." *Id.* (Emphasis added).

Again, this is consistent with *Waldburger*: statutes that contain express periods for filing an action are statutes of repose; whereas, statutes that prescribe a time limit during which an action that has already accrued may be filed are statutes of limitations. *See also Cedar River Inv Co, LLC v. Benchmark Engr, Inc*, 2009 WL 1717387, at *3 (Mich App June 18, 2009) ("The parties dispute whether MCL 600.5839(2) is both a statute of limitations and a statute of repose, or only a statute of repose. A telltale sign that a statute is one of repose is the inclusion of language to the effect that ***a party may not file an action after a specific date or period of time***. MCL 600.5839(2) prohibits a cause of action from being brought more than six years after delivery of a survey or report."). (Emphasis added).

[17] Now repealed.

Federal courts in Michigan have also reviewed this issue. Recently, the Eastern District of Michigan considered the differences between statutes of repose and limitations in *Dykema Excavators, Inc v Blue Cross & Blue Shield Of Michigan*, 77 F Supp 3d 646 (ED Mich 2015). The court, applying *Waldburger,* explained that "a statute of limitations establishes a deadline for commencing a civil action measured from the date the claim accrued…A variant allows a plaintiff time to discover his claim, that is, when the claim becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs." *Id.* at 653. (Internal citations omitted). A statute of repose, on the other hand, "does not focus on the injured party; instead it measures time from a culpable act of the putative defendant." *Id.*

In 2014, the Sixth Circuit Court of Appeals issued an instructive and persuasive decision. It not only confirms the characteristics of statutes of limitations and repose, but indeed it expressly rejects the notion that the very provisions of 4515(1)(e) at issue here are ones of repose rather than limitation. Specifically, in *Techner v Greenberg*, 553 Fed Appx 495, 2014 WL 169073 (6th Cir, 2014), the plaintiffs brought claims for breach of contract, breach of fiduciary duty under MCL 450.4404, and minority member oppression under MCL 450.4515 based on the defendant's failure to make monetary distributions to the minority membership. *Id.* at *4-5. The defendant in *Techner* argued that the claims arising under sections 4404 and 4515 were subject to statutes of repose, to which fraudulent concealment did not apply, and therefore the claims were time barred.

The Sixth Circuit adamantly disagreed, correctly holding that the inclusion of the language "*has accrued*" in subsections 4404(6) and 4515(1)(e) means that they must be statutes of limitations and cannot be statutes of repose. Though not binding, the holding is persuasive, consistent with principles of statutory interpretation, and should be adopted by this Court:

> Given the language of sections 450.4404(6) and 450.4515(1)(e) that specifically references commencement of actions "within 3 years after the cause of action *has accrued*" the rationale of the district court in *Virginia M. Damon Trust* makes more logical sense and linguistic sense than do the contrary decisions in *Baks* and *Trident-Brambleton*. (footnote omitted). **We conclude thus that the statutory sections at issue in this appeal are statutes of limitations, not statutes of repose**, and that Techner should have been allowed three years from the date of the accrual of her breach-of-fiduciary-duty cause of action to initiate her lawsuit.

(Emphasis added). *Id.* at *8.

D. The Court of Appeals Correctly Held that 450.4515(1)(e) is a Statute of Limitations

1. Principles of Statutory Construction Demonstrate that MCL 450.4515(1)(e) is a Statute of Limitations, Not Repose

To summarize, based on guidance from the U.S. Supreme Court, precedent from this Court, and persuasive case law from the Court of Appeals and federal courts, the following factors should be considered in determining whether a particular statute is one of repose or limitations:

First, a statute is one of limitations if the time period in which a plaintiff may bring a claim begins to run after the cause of action accrues. Similarly, a statute is a statute of limitations if it permits a plaintiff time to discover that the Plaintiff has a claim, i.e., when the claim is discovered or ought reasonably to have been discovered.

Second, a statute is one of repose if it can preclude a defendant's liability before the plaintiff is able to bring a cause of action, i.e., *before* the plaintiff's cause of action has accrued. The statute is a statute of repose if it focuses on the defendant's actions, not on the harm caused to the Plaintiff.

Applying these principles to MCL 450.4515(1)(e), it becomes evident that the statute is one of limitations, not repose. The U.S. Supreme Court stressed in *Walburger* the importance of looking at the text of the statute to determine the purpose and effect of the specific limitation period imposed. Once again, the language of MCL 450.4515(1)(e) is as follows:

> (e) ….An action seeking an award of damages must be commenced within 3 years after the cause of action under this section **has accrued** or within 2 years after the member discovers or reasonably should have discovered **the cause of action** under this section, whichever occurs first. MCL 450.4515(1)(e). (Emphasis added).

The section has two provisions: an action seeking an award of damages must be commenced (1) within 3 years after the cause of action under this section has accrued, **or** (2) within 2 years after the member discovers or reasonably should have discovered the cause of action under this section, whichever occurs first.

Both provisions are statutes of limitations. Provision (1) is a statute of limitations because, under the principles cited above, it focuses on the harm to the plaintiff, not on the defendant's act, and the time begins to run once the plaintiff's cause of action has accrued. Provision (2) similarly focuses on the plaintiff's harm, and the time begins to run once the plaintiff discovers or reasonably should have discovered the cause of action. These two provisions are textbook statutes of limitations, and this analysis is supported by the U.S. Supreme Court, the Michigan Supreme Court, the Michigan Court of Appeals, and numerous federal courts located in Michigan.[18]

Here, the Court of Appeals correctly applied the above principles. The court accurately stated that "[s]tatutes of limitation deal with a claim's accrual," whereas "statutes of repose do not pertain to a claim's accrual; rather, they prevent a claim from ever accruing if a lawsuit is not brought within a certain time after the injury is sustained." *Frank v. Linkner*, 310 Mich App 167 (2015). "Unlike a statute of repose, then, the three-year period of 4515(1)(e) functions as a statute of limitations because it does not prevent a cause of action from accruing a certain time period after an event." *Id.* This reasoning is in line with *Waldburger* and abundant Michigan

[18] A review of the language of various Michigan and federal statutes of repose and statutes of limitations supports this conclusion. *See* App 198b, *Table of various statutes.* A review of this sampling of statutes demonstrates the consistent nature of the principles outlined above.

case law; the Court of Appeals' Opinion should be affirmed. If 450.4515(1)(e) were a statute of repose, there would be no need to mention accrual or discovery.

2. <u>The Legislature Intended MCL 450.4515(1)(e) to be a Statute of Limitations</u>

The word "accrued," which Defendants ignore, is critical and dispositive of the issues before the Court. The Legislature's decision to include the word "accrued" in the statute cannot be understated, and cannot be deemed accidental or unintentional, as this Court has set forth the following canons of statutory construction:

> Because the Legislature is presumed to understand the meaning of the language it enacts into law, statutory analysis must begin with the wording of the statute itself. Each word of a statute is presumed to be used for a purpose, and, as far as possible, effect must be given to every clause and sentence.
>
> The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another. Where the language of the statute is clear and unambiguous, the Court must follow it.

Robinson v Detroit, 462 Mich 439, 459; 613 NW2d 307 (2000) (citations omitted). Thus, if the Court is to give full meaning and effect to the statute, it follows from the Legislature's choice of words that *every* element of what it takes for a claim to in fact accrue under Michigan law must exist before the time begins to run on the claim; therefore, MCL 450.4515(1)(e) is a statute of limitations.

When the Legislature intends to enact a statute of repose, the Legislature does so, with very specific language. *See* MCL 600.5838(a)(2); MCL 600.5839(1); MCL 600.5838b. Similarly, when the Legislature intends to enact a statute of limitations, it does so, with very specific language. *See* MCL 600.5813. Had the Legislature intended MCL 450.4515(1)(e) to be a statute of repose, it would have used language to indicate that the time begins to run at some point *other than* when the plaintiff's cause of action accrues. Instead, the Legislature included

very specific and unambiguous language that focuses on accrual and the plaintiff's cause of action.

The Legislature's inclusion of the accrual language in the statute means that it absolutely cannot be a statute of repose, for a statute of repose is not based on the accrual of a claim. A statute of repose is the antithesis of a statute of limitations, because the former commences to "run from the occurrence of some event other than the injury allegedly giving rise to the claim," whereas the latter begins to run when the claim accrues. *Virginia M. Damon Trust v Mackinaw Financial Corp*, 2008 WL 53230 at *6 (WD Mich, Jan 2, 2008). "Where the language of the statute is clear and unambiguous, the Court must follow it." *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000).

As the plain language of MCL 450.4515 makes clear, the Legislature's enactment of the statute was intended to ***protect*** members of limited liability companies from oppressive and illegal actions taken by those in control of the company. If MCL 450.4515(1)(e) is a statute of repose, that would do just the ***opposite***. Indeed, if Defendants' argument is accepted, and if (1)(e) is held to be a statute of repose, this incentivizes the control group to keep the minority members in the dark about potentially unlawful or oppressive transactions. The control group would have every reason to conceal their actions until after the statute of repose has run, and then be completely free from liability. This certainly cannot be what the Legislature intended, and the plain language of (1)(e) demonstrates that, indeed, it was not.

The Legislature's use of the accrual language in the statute means: (1) a claim does not accrue until damages are incurred, consistent with Michigan Supreme Court precedent; and (2) 4515(1)(e) is not a statute of repose, so, as discussed, *infra*, equitable tolling applies. To the extent that the discredited and repeatedly repudiated *Baks* opinion suggests otherwise, it is wrong, and this Court is not bound to follow that decision from the Court of Appeals.

3. The Court of Appeals Correctly Held that *Baks* is Inapplicable

Defendants misstate the Court of Appeals' holding with regard to *Baks*. As the Court of Appeals correctly held, *Baks* simply does not apply in this case: "the *Baks* majority simply denoting the limitations period in an analogous statute as one of repose is incapable of definitively settling that issue." (App 39a, p. 188). Importantly, *Baks* was decided prior to the 2002 Amendments to MCL 450.4515 which added section (1)(e). Indeed, *Baks* was decided even before the 2001 Amendments to 450.1489, which added the identical provision.

Given Defendants' mischaracterization of the Court of Appeals' holding on this issue, which clearly described that *Baks* simply did not lay down a rule of law on this issue, it bears quoting the unanimous Court of Appeals' opinion:

> In the face of § 4515(1)(e)'s plain language, defendants maintain that § 4515(1)(e) is a statute of repose. They stake their argument wholly on *Baks v. Moroun*, 227 Mich.App 472; 576 NW2d 413 (1998), overruled in part on other grounds by *Estes v. Idea Eng'g & Fabricating, Inc.*, 250 Mich.App 270; 649 NW2d 84 (2002), which described an analogous provision in the business corporation act ("BCA"), MCL 450.1101 et seq., as a statute of repose. *Baks*, 227 Mich.App at 486 (describing MCL 450.1541a(4) (pertaining to a corporate officer's discharge of fiduciary duties) as a statute of repose).
>
> ***Baks* did not analyze whether the plain language of the BCA's analogous provision was a statute of repose or limitation, however. That issue was simply not before the Court**. Instead, the *Baks* majority simply called the analogous provision's limitations period a statute of repose **before proceeding to resolve the central issue of that case, i.e., whether MCL 450.1489 created an independent cause of action for shareholder oppression claims**. *Baks*, 227 Mich.App at 476. **The relevant time period**—imported from a different section of the BCA—**had nothing to do with this determination**. **It is for this reason that neither *Estes* (which overturned *Baks*' central holding) nor the *Baks* dissent (which *Estes* adopted) even addressed whether the time period was one of repose or limitation**. They simply refer to the time period as a statute of limitation. *Estes*, 250 Mich.App at 272, 281; *Baks*, 227 Mich.App at 500 (HOEKSTRA, J., dissenting). Again, the *Baks* majority offered nothing more, describing the relevant limiting language as a statute of repose only in conclusory fashion.

(App 39a, p. 188) (emphasis added).

The Court of Appeals then went on to correctly describe the long-established standard for whether a court has laid down a legal rule governing future cases, which *Baks* simply did not do:

> This is fatal to defendants' reliance on *Baks*, for it is well established that **to decide a question of law, a court must specifically intend to lay down a legal rule governing future cases**. *Foreman v. Foreman*, 266 Mich.App 132, 140; 701 NW2d 167 (2005), quoting *Detroit v. Mich. Pub Utilities Comm*, 288 Mich. 267, 301; 286 NW 368 (1939). **To do this, the court must thoroughly consider the issue and directly intend to resolve it**. *Foreman*, 286 Mich.App at 140; *Detroit*, 288 Mich. at 301.

(App 39a, p. 187) (emphasis added). The Court of Appeals went on to describe this Court's precedent, including the rule that, "to constitute resolution of a question of law, it . . . must involve, among other things, 'fullness of the discussion' of the issue." (*Id*), quoting *McNally v Bd of Canvassers of Wayne Co*, 316 Mich 551, 557–558 (1947). But, as the Court of Appeals correctly held, "the *Baks* majority did not do this. Rather, it just described the relevant limiting language in conclusory fashion. This is a far cry from declaring a rule of law, let alone a turning of the judicial mind to the subject." (*Id*). "[T]he *Baks* majority simply denoting the limitations period in an analogous statute as one of repose is incapable of definitively settling that issue. *Baks* does not aid defendants." *Id*. at 188.

The rule of law purportedly laid down in *Baks* was that MCL 450.1489 does not create an independent statutory cause of action – an incorrect ruling that was soundly overruled by *Estes v IDEA Engineering & Fabricating, Inc*, 250 Mich App 270; 649 NW2d 84 (2002). Everything else in *Baks* was a passing comment or dicta. As this Court held in *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 436-37; 751 NW2d 8 (2008): "Obiter dictum is defined as . . . a judicial opinion in a matter related but not essential to the case," and a "statement that is dictum does not constitute binding precedent under MCR 7.215(J)." The Court of Appeals was not bound by the "repose" dictum in the *Baks* decision.

Even if, theoretically, *Baks* laid down a rule of law on this issue, which it absolutely did

not, Defendants' argument fails on even further grounds. The Court of Appeals in *Estes* – in which a special panel was convened in a proceeding under MCR 7.215(J)(2) – overruled *Baks* to whatever extent Defendants purport to rely on *Baks* now. This is reflected in the language of *Estes* itself, which "adopt[ed]" Judge Hoekstra's dissent in *Baks* "as [its] own." 250 Mich App at 279. Judge Hoekstra's dissent, meanwhile, plainly called the statutory period one of limitations, not repose: "I disagree with the majority's conclusion in section I, which is that the *statute of limitations* applicable to a cause of action brought by shareholders of a closely held corporation is the same *statute of limitations* applicable to…action[s] brought by shareholders of a publicly held corporation." *Baks*, 227 Mich App at 500 (Hoekstra, J., dissenting) (emphasis added). This means that Judge Hoekstra and the *Estes* majority: (1) regarded any mention of "repose" by the *Baks* majority to be so inconsequential to the *Baks* majority's opinion that Judge Hoekstra referred to this as a statute of limitations; and/or (2) regarded the *Baks* majority as being plainly overruled to whatever extent it mentioned "repose".

Defendants' reliance on *Detroit Gray Iron & Steel Foundries, Inc v Martin*, 362 Mich 205; 106 NW2d 793 (1961) is misplaced. *Detroit Gray Iron* states absolutely nothing regarding how to interpret whether a statute is one of repose or limitations, and it certainly does not say that the statute here is a statute of repose. In fact, the Court in *Detroit Gray Iron* refers to the language of the statute there as one of "limitations." The issue before the Court in *Detroit Gray Iron* was the effect of the limiting language in a particular statute on the general statutes of limitations for actions against directors for negligence or fraud:

> The concluding language of section 47 limiting actions against directors for conduct below the standard specified to 6 years from the date of delinquency or 2 years from the time of its discovery, 'whichever shall sooner occur,' ***radically alters the periods of limitations which would otherwise apply to actions against directors either for negligent conduct or fraud***. *Id.* at 800.

In other words, the Court was considering how the statute of limitations in the business statute

affected statutes of limitations for other potential causes of action. This is why the *Baks* Court relied on *Detroit Gray Iron* to answer the following question: "whether the trial court properly applied the limitation period contained in § 541a to plaintiffs' claims under § 489, or whether plaintiffs' claims under § 489 should be governed, as plaintiffs argue, by the residual or "catch-all" statute of limitations..." *Baks*, 576 NW2d at 417 (Mich App 1998). The issue in both *Baks* and *Detroit Gray Iron* was which statute of limitations applied to the plaintiffs' claims, *not* whether the statutes were ones of limitations or repose. *Detroit Gray Iron* does not assist Defendants.

Although it is true that the statute in *Detroit Gray Iron* was likely a statute of both limitation and repose, that is because of the statute's wording: the first section ("6 years from the date of delinquency") is a statute of repose because the time begins to run from the occurrence of the defendants' action (in other words, the section focuses on the defendant); the second section ("2 years from the time of its discovery") is a statute of limitations, because it focuses on the harm caused to the plaintiff, and when the cause of action accrues. However, the Court never provided any definitive guidance on the matter.

At any rate, the statute in the present case cannot be analogized to the statute in *Detroit Gray Iron*. Both sections of MCL 450.4515(1)(e) are statutes of limitation, as described above. Both provisions of the statute focus on the harm to the plaintiff; both provisions require the plaintiff to have a cause of action; and both provisions are consistent with the characteristics of statutes of limitations. Under the principles detailed above, MCL 450.4515(1)(e) is a statute of limitations. As such, and as detailed below, equitable tolling applies to Plaintiffs' claims.

II. The Court of Appeals Correctly Held that Plaintiffs' Member Oppression Claim Accrued in August 2012

The member oppression statute in question, MCL 450.4515, provides in full:

> (1) A member of a limited liability company may bring an action in the circuit court of the county in which the limited liability company's principal place of business or registered office is located to establish that acts of the managers or members in control of the limited liability company are illegal or fraudulent or constitute willfully unfair and oppressive conduct toward the limited liability company or the member. If the member establishes grounds for relief, the circuit court may issue an order or grant relief as it considers appropriate, including, but not limited to, an order providing for any of the following:
>
> > (a) The dissolution and liquidation of the assets and business of the limited liability company.
> > (b) The cancellation or alteration of a provision in the articles of organization or in an operating agreement.
> > (c) The direction, alteration, or prohibition of an act of the limited liability company or its members or managers.
> > (d) The purchase at fair value of the member's interest in the limited liability company, either by the company or by any members responsible for the wrongful acts.
> > (e) An award of damages to the limited liability company or to the member. An action seeking an award of damages must be commenced within 3 years after the cause of action under this section has accrued or within 2 years after the member discovers or reasonably should have discovered the cause of action under this section, whichever occurs first.
>
> (2) As used in this section, "willfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that **substantially interferes** with the interests of the member as a member. Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other member interests disproportionately as to the affected member. The term does not include conduct or actions that are permitted by the articles of organization, an operating agreement, another agreement to which the member is a party, or a consistently applied written company policy or procedure.

MCL 450.4515.

By its statutory nature, the oppression cause of action set forth in MCL 450.4515 calls for a determination of when the wrongful action and damages came together to culminate in an accrued actionable claim. This is true because, under subsection (2), the willfully unfair and

oppressive conduct, to be actionable, must "substantially interfere[] with the interests of a member as a member." This statutory language is inconsistent with a conclusion that accrual occurs from the happening of a discrete wrong causing no damage, such as, under these facts, the signing of a secret document that contemplates another transaction that could damage a plaintiff.

Indeed, the parties agree that a cause of action for oppression accrues ***when all elements are in place and can be pleaded***. (*Defs' Brf*, p 15). Plaintiffs' claims accrued in August 2012, when Defendants liquidated the ePrize companies, pocketed $100 million, and dispossessed Plaintiffs of the value of their membership interests. This is when the "harm" occurred; this is when the Plaintiffs first sustained damage; and this is when Defendants' "continuing course of conduct" caused "substantial interference" with Plaintiffs' membership interests. Plaintiffs' cause of action did not exist until this occurred. Under the facts of this case, Defendants' mere signing of the Fifth Operating Agreement in 2009, alone, did not trigger the statute of limitations on Plaintiffs' member oppression claim. Rather, it was the damaging liquidation and distribution event in 2012 that accrued the action for member oppression in this case.

A. Standard of Review

"This Court reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7)." *Terlecki v Stewart*, 278 Mich App 644, 649; 754 NW2d 899 (2008) citing *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 386; 738 NW2d 664 (2007). Further, "[i]n determining whether summary disposition was properly granted under MCR 2.116(C)(7), this Court 'consider[s] all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them.'" *Waltz v Wyse*, 469 Mich 642, 647-648; 677 NW2d 813 (2004).

"In the absence of disputed facts, the question whether a cause of action is barred by the statute of limitations is…a question of law." *Boyle v General Motors Corp*, 468 Mich 226, 229-

230; 661 NW2d 557 (2003) citing *Moll v Abbott Laboratories*, 444 Mich 1, 26; 506 NW2d 816 (1993); *see also Scherer v Hellstrom*, 270 Mich App 458, 461; 716 NW2d 307 (2006); *DiPonio Constr Co v Rosati Masonry Co, Inc*, 246 Mich App 43, 47; 631 NW2d 59 (2001). However, where there are disputed facts (as in the instant case), the questions of whether a statute of limitations bars a claim, and the governing accrual date involve questions of fact. *See Tumey v City of Detroit*, 316 Mich 400, 411; 25 NW2d 571 (1947) ("the burden is upon a defendant who relies upon a statute of limitation as a defense to prove facts which bring the case within the statute, unless such facts are sufficiently shown by the plaintiff's evidence"); *Flynn v McLouth Steel Corp*, 55 Mich App 669 (1974) ("The question of the governing date of accrual of a cause of action for statute of limitations purposes is a question of fact").

B. Under MCL 600.5827 and this Court's Precedent, a Claim Does Not Accrue Until "Harm" is Suffered by the Plaintiff

As the Court of Appeals correctly explained in its published opinion, a claim does not "accrue" for statute of limitations purposes until a plaintiff suffers distinct harm. (App 39a, p. 188). The statute governing accrual, MCL 600.5827, states that "the claim accrues at the time the wrong upon which the claim is based was done." This Court has made clear that "the wrong" in MCL 600.5827 refers to "the date on which the defendant's breach harmed the plaintiff, as opposed to the date on which the defendant breached his duty." *Moll v Abbott Laboratories*, 444 Mich 1, 11-12; 506 NW2d 816 (1993). This Court has repeatedly emphasized this point: "The wrong is done when the plaintiff is harmed rather than when the defendant acted."[19] Here,

[19] *Stephens v Dixon*, 449 Mich 531, 534–535 (1995). See also, e.g., *Connelly v Paul Ruddy's Equipment*, 388 Mich 146, 150-151; 200 NW2d 70 (1972) (same); *Boyle v Gen Motors Corp*, 468 Mich 226, 231 (2003) (same); *Lemmerman v Fealk*, 449 Mich 56; 534 NW2d 695, 697 (1995) (same).

Defendants' breach did not "harm" the Plaintiffs until 2012, when the company was liquidated.[20]

This Court has also held that a claim does not "accrue" until every element, "including damage," is present. *Connelly*, 388 Mich at 151. See, also, e.g., *Stephens*, 449 Mich at 539 (same). In *Connelly*, the Court held that the statute of limitations began to run when the plaintiff actually got hurt, not when the company committed the negligent act. Defendants misapply *Connelly*, claiming that all elements of Plaintiffs' member oppression claim, including the "harm," were present in 2009 when Defendants adopted the Fifth Operating Agreement.[21] This is akin to arguing that the plaintiff in *Connelly* was fully harmed by being in the company's negligent environment, which had the potential to cause her damage but which did not damage her until she suffered physical injury. Plaintiffs' claims in the instant case were purely speculative, until they suffered actual injury upon the 2012 liquidation and egregious distribution.

Defendants ignore the "accrual" language of the statute, which requires complete accrual before the clock begins ticking, and accrual cannot exist without damages. There is nothing in

[20] Defendants' argument that no case supports the Court of Appeals' accrual analysis is simply false. See, e.g., *Moll*, *supra*, and *Connelly*, *infra*. There are even cases applying this accrual rule under MCL 450.4515(e). See, e.g., *Techner v Greenberg*, 553 F App'x 495, 505 (6th Cir 2014) (in a section 4515 case: "claims accrue in Michigan not when a defendant perpetrates a wrong, not when a plaintiff learns or should have learned of the harm done, but rather only when the plaintiff actually suffered damages as a result of the defendant's actions," which was "upon the failure to receive proper distributions"); *In re Richard Michael Wilcox*, 310 BR 689 (ED Bkr Mich 2004) (in a section 4515 case: "a cause of action for breach of duty is triggered at . . . the time that the wrong causes injury").

[21] Indeed, there are substantial questions of fact as to whether the Fifth Operating Agreement was even in effect. The evidence points to it having not been fully executed, and, even if it were, it was materially breached by the Defendants' self-dealing and oppressive profiteering. This violated the Fifth Operating Agreement, section 4.3 (requiring that "[e]ach manager shall discharge his, her or its duties in good faith" and "with the care that an ordinarily prudent person in a like position would exercise under similar circumstances") and section 4.5 (prohibiting Defendants from being on both sides of a transaction with the company without the approval of disinterested managers and the members). Defendants' material breach forecloses Defendants from enforcing it.

the case law or in the statutes themselves that even remotely suggests that clear Michigan precedent requiring the existence of damages (actual accrual) has somehow been abrogated. *See Moll v Abbott Laboratories*, 444 Mich 1, 13; 506 NW2d 816 (1993); *Stephens v Dixon*, 449 Mich 531, 539 (1995); *Connelly v Paul Ruddy's Co*, 388 Mich 146, 151; 200 NW2d 70 (1972).

Contrary to Defendants' unsupported contention, Plaintiffs have not argued that some of their claims began to accrue sooner than other claims. (*Defs' Brf*, p 16). Plaintiffs have consistently maintained that all of their claims accrued in 2012. Plaintiffs have argued in the alternative, that even if Plaintiffs' claims began to accrue in 2009, certain of Plaintiffs' claims (e.g., a forced buy-out) fall under the residual six-year statute of limitations, as opposed to the shortened period listed in MCL 450.4515(1)(e) for a damages claim.

Defendants misconstrue *Cooey v Strickland*, 479 F.3d 412 (6th Cir 2007), which supports Plaintiffs. *Cooey* confirms the "traditional rule of accrual," quoting the U.S. Supreme Court, which is that "the statute of limitations commences to run . . . when the wrongful act or omission results in damages[.]" *Id* at 19. That traditional rule would have controlled in *Cooey*, but it was a death penalty case, and, thus, "[s]etting an accrual date at the point when the actual harm is inflicted, ie., at the point of execution, is problematic in this context[.]" *Id* at 418.

Further, Defendants disregard *Bonelli v Volkswagen of America, Inc*, 166 Mich App 483; 421 NW2d 213 (1988), as not directly discussing statutes of limitation. But the Court of Appeals cited *Bonelli* for the important point that a party cannot bring a claim based on purely speculative damages. This is directly relevant to the statute of limitations "accrual" analysis here: a plaintiff cannot bring a cause of action as long as the plaintiff's damages are purely speculative. As long as there is no cause of action for a plaintiff to bring, there can be no "accrual". If Plaintiffs had sued in 2009, Defendants would have undoubtedly claimed that Plaintiffs' damages were speculative.

C. An "Oppression" Claim Under MCL 450.4515 Involves a "Continuing Course of Conduct" or "Series of Actions"

In misconstruing and ignoring the actual language of the member oppression statute, Defendants also fail to recognize the unique and specific components of an enforceable claim under MCL 450.4515. Under the statute, the plaintiff members must establish liability on the part of the defendant managers or members in order to be entitled to any relief at all under MCL 450.4515(1): "If the member establishes grounds for relief, the circuit court may issue an order or grant relief as it considers appropriate[.]" (Emphasis added). See also, e.g., *Madugula v Taub*, 496 Mich 685, 702; 853 NW2d 75 (2014) ("Under [the shareholder oppression statutory analogue], once a shareholder establishes 'grounds for relief'—i.e., that oppression occurred—"the circuit court may make an order or grant relief as it considers appropriate," including an award of money damages.") (emphasis added).

The grounds for relief under the statute include "willfully unfair and oppressive conduct" by the defendant managers or members, MCL 450.4515(1). "'[W]illfully unfair and oppressive conduct' means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the member as a member." MCL 450.4515(2) (emphasis added). This, of course, is the well-understood and fundamental nature of an oppression claim. See, e.g., Moscow & Ankers, *Oppression of Minority Shareholders*, Mich BJ, Oct 1998, at 1088, 1093, 1095 (A "continuing wrong is the object of the section," "abuse of minority shareholders typically will be part of continuing actions," and the statute "is directed mainly at continuing wrongs."), citing *Gidwitz v Lanzit Corrugated Box Co*, 20 Ill 2d 208, 221 (1960) ("The cumulative effects of these many acts and incidents, and their indicated continuing nature, combine to constitute . . . oppression[.]"); Schulman, Moscow & Lesser, Michigan Corporation Law & Practice at 133 ("Some continuing or substantial injustice inconsistent with

the parties' prior relationship and not authorized by agreement should be present."). In the present case, the "continuing course of conduct" and "series of actions" that substantially interfered with the Plaintiffs' interests did not even come into existence until 2012.

Defendants focus only on their conduct (their "continuing course of conduct" or their "significant action or series of actions"). But Defendants neglect the requirement that their conduct must also "substantially interfere[]" with Plaintiffs' membership interests. In other words, Defendants focus only on their actions, not on the effect of their actions. For oppression to occur—and for the cause of action to accrue and for the statute of limitations to begin running—there must be both wrongful conduct and substantial interference in Plaintiff's membership interest.

Although the Defendants' initial act of implementing the Fifth Operating Agreement in 2009 is relevant to this case as it shows the Defendants' oppressive intent from the beginning, it was not until the Defendants sold the company and unfairly distributed the proceeds in 2012 that their conduct became a "continuing course of conduct" and "series of actions" that "substantially interfered" with Plaintiffs' interests as members. It was not until that pivotal action occurred that Plaintiffs could establish "willfully unfair and oppressive conduct," as that term is defined, under MCL 450.4515. Plaintiffs then exercised their statutory right to sue based on that continuing course of conduct or series of actions and seek relief. And this cause of action certainly did not start accruing, for statute of limitations purposes, before it existed.

Defendants, however, ignore the basis of the "oppression" cause of action. They focus on the statute's non-exhaustive list of remedies, suggesting that some might have addressed Defendants' wrongdoing back in 2009. Aside from the fact that Defendants fraudulently concealed their wrongdoing in 2009 from Plaintiffs, which tolled the accrual of Plaintiffs' claim until 2012 even if it accrued in 2009 (see MCL 600.5855), the potential remedies that

theoretically could have addressed Defendants' wrongdoing at a given time are irrelevant until and unless Plaintiffs have a cause of action under MCL 450.4515, and that was not until 2012.

Defendants' argument is also contrary to the plain language of the statute. MCL 450.4515 does not require that a member commence suit upon there being an inkling of an unfair act by a defendant member/manager that a remedy might address. Yet that is what Defendants' argument presupposes. MCL 450.4515 provides that a member may commence suit after there has been a "continuing course of conduct" or "series of actions" that "substantially interferes" with his member rights. "In construing a statute, a court should presume that every word has some meaning and should avoid any construction that would render a statute, or any part of it, without meaning or effect." *Altman v Meridian Twp*, 439 Mich 623, 635; 487 NW2d 155 (1992). If Defendants' position were accepted and a claim under MCL 450.4515 necessarily started accruing the moment there was a single unfair act that a remedy might address, the statutory right to bring suit based on a continuing course of conduct or series of actions that causes "substantial interference" would be rendered meaningless and confused. Indeed, if the Court adopts Defendants' argument, then a shareholder would be required to file suit the moment an officer, director, or manager does *anything* even the slightest bit untoward, or risk facing a statute of limitations bar. This would lead to a multiplicity of filings on nascent issues that may never damage the plaintiffs and may never mature into a cause of action.

Meanwhile, the fact that Plaintiffs generally listed in their Complaint some of the interim relief provided under MCL 450.4515(1) simply reflects the fact that this is an oppression action

in which the trial court has broad discretion to fashion relief as it considers appropriate.[22]

Lastly, Defendants' reliance on *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264; 769 NW2d 234 (2009) and its abrogation of the *common law* "continuing wrongs" doctrine has no relevance here. MCL 450.4515 provides an independent, statutory cause of action for a continuing wrong (i.e., a "continuing course of conduct" or "series of actions").

D. The "Harm" and "Substantial Interference" Did Not Occur Until 2012

Even if the distribution structure implemented in 2009 had not been fraudulently concealed from Plaintiffs, which it was, the harm to Plaintiffs did not occur until the 2012 event. As explained by Plaintiffs' expert in his unrebutted Affidavit, "The dollar amount and proportion [of proceeds] (both which ultimately were zero at the 2012 transaction date) could only be determined in 2012, the date on which the triggering event (e.g., liquidation) and proceeds are actually received by the Company." (App. 37b, ¶ 12).

Prior to the liquidation event in 2012, Plaintiffs' damages were purely speculative. It would not have been clear whether the issuance in 2009 was harmful to the other equity owners of the Company (i.e., whether Plaintiffs were harmed), because the economic impact would not be known until: (1) a future triggering event (e.g., the exercise of an option to convert the security into another type of security or the liquidation of the Company or its assets); (2) the amount of money received by the Company from a future asset sale was known; (3) the timing of the future triggering event was known; and (4) fair market value was determined by the Company's Managers at a future conversion event date. (App 34b, ¶ 5).

[22] As explained by this Court, "Despite Madugula's request for specific relief, the court was free under the language of the statute to grant relief as it considered appropriate, or none at all, even if he were to establish his claim of oppression." *Madugula v Taub*, 496 Mich 685, 711-712 (2014) (A claim under 450.1489 "allows the court to shape the remedy regardless of what a claimant seeks.").

Indeed, the passage of time until the liquidation event occurred affected the preference amount for each of the newly created B units, and several other types of equity Units. (App 35b ¶ 6(b)). Specifically, the Class B Units were granted the right to have their liquidation preference increase from March 2009 to the date of a liquidation of the company. (App 36b, ¶ 8(b)). In other words, "the liquidation preference (and value) of these Class B Units continued to grow, just as if they were accruing interest," and therefore the Plaintiffs' harm was completely speculative until the 2012 liquidation event. *Id.*

Whether Plaintiffs were damaged depended on the occurrence of a liquidation event, the date of that liquidation event, and the amount of proceeds received by the Company from that liquidation event. Until that event occurred, it was speculative whether Plaintiffs would be damaged, and, therefore, Plaintiffs were unable to bring their cause of action prior to 2012. See *Bonelli v Volkswagen of America, Inc*, 166 Mich App 483 (1988); *Sutter v Biggs*, 377 Mich 80; 139 NW2d 684, 686 (1966) ("Remote contingent, or speculative damages are not considered in conformity to the general rule [that a tortfeasor is liable for all injuries resulting from his wrongful act]."). In 2012, Plaintiffs' speculative injury became certain – Defendants liquidated the company and Plaintiffs' shares were completely diluted. See *Stephens v Worden Ins Agency, LLC*, 307 Mich App 220; 859 NW2d 723 (Negligence action "accrued when the insurer denied the insured's claim," not on the date the insurance contract was created, because, on "that date, any speculative injury becomes certain, and the elements of the negligence action are complete.")

Further, it was only clear that Defendants would dilute Plaintiffs when the disbursement actually occurred, especially given the promises and actions of Defendants assuring Plaintiffs they would not be diluted upon an actual sale and distribution of the company. For example, as explained in the affidavit of Plaintiff Atler, who was the company's controller, the Defendants,

including Linkner, unequivocally promised there would be no dilution or subordination. In fact, they even had Plaintiff Atler "perform[] numerous calculations to correct the dilution caused by the convertible debt offerings in conjunction with possible sale scenarios of ePrize." (App 139b, ¶¶ 11-24). If Defendants had honored their promise to not dilute or subordinate Plaintiffs' interest, the Plaintiffs would have had no damages. Plaintiffs had the right to assume that Defendants would so abide by their agreement. Indeed, there were millions of dollars in sale proceeds over which Defendant Linkner ultimately had discretionary authority, which could have been distributed to the Plaintiffs to negate the dilutive effects of the Fifth Operating Agreement. Instead, these were paid to others as "management bonuses." (App 82b). Finally, as the Court of Appeals recognized in its published opinion, a variety of other intervening actions or circumstances could have prevented the actual harm from accruing, including, for example, the operating agreement could have changed again, as it had been done four times before.[23]

The cases cited by Defendants do not support their position. In *Solowy v Oakwood Hosp Corp*, 454 Mich 214; 561 NW2d 843 (1997), as of the accrual date, the plaintiff's physical injury was clear-cut and the critical facts regarding her previous doctor's omissions were clearly known. This supports accrual as of the 2012 sale and distribution in the instant case.

In *Luick v Rademacher*, 129 Mich App 803; 342 NW2d 617 (1983), the plaintiff incurred clear appreciable harm in dealing with the effects of his attorney's malpractice, as opposed to the

[23] Defendants allege that ePrize "could not" amend its operating agreement after 2009, because the holders of the Series C units allegedly made a very risky investment in the company. According to Defendants, this investment somehow prohibited Defendants from amending the operating agreement in the future. This argument is unsupported and legally baseless; Defendants are asking the Court to take their word that they would have *refused* to amend the operating agreement due to the Defendants' investments. While this highlights Defendants' oppressive intent, it is not persuasive. Defendants *could have* amended the operating agreement between 2009 and 2012; simply because they allege that they would not have done so, does not make it true. The operating agreement may have been amended for a number of reasons, including, for example, if future new investments were required, or to honor Defendants' promises not to dilute or subordinate Plaintiffs' interest.

instant case, in which no harm or effects were incurred by the Plaintiffs until the 2012 sale and distribution.

In *Berrios v Miles, Inc,* 227 Mich App 470; 576 NW2d 431 (1997), the plaintiff being infected with HIV from a blood transfusion was a clear-cut injury, a far cry from adoption of the Fifth Operating Agreement in the instant case.

In *Schnelling ex rel Bankr Est of Epic Resorts, LLC v Prudential Securities, Inc*, 2004 WL 1790175, at *2 (ED PA Aug 9, 2004), the court clarified that in order for the statute of limitations to begin running, the plaintiff must suffer "actual legal damage necessary to make the claim suable." In *Schnelling*, the defendant realized actual legal damage when it learned that the plaintiff did not have funds to adequately pay debts it owed to the defendant, and when the plaintiff entered bankruptcy. This is a clear-cut injury. The court distinguished *Schnelling* from *GB Occupational Therapy, Inc v RHA Health Services Inc*, 357 F3d 375, 384 (3d Cir 2004) in which the Third Circuit held that "even though the allegedly interfering acts were launched" prior to the date in question, the tort was not consummated until the contract was terminated and legal damage was sustained. Here, Plaintiffs could not have known the effect of the Fifth Operating Agreement until the liquidation event in 2012. In other words, Plaintiffs did not suffer "actual legal damage necessary to make the claim suable" until 2012.[24]

[24] In this case, the Plaintiffs are alleging that the Defendants breached their duties as a result of the self-interested transaction in selling the company. Defendants cannot claim that they should not be held accountable because they distributed the proceeds in accordance with the Fifth Operating Agreement. First, Defendants materially breached the Fifth Operating Agreement, and therefore, cannot enforce it. See *infra* at page 31. Second, this argument ignores the Court of Appeals' holding in *Berger v Katz,* 2011 WL 3209217, (Mich App July 28, 2011), *appeal denied* 491 Mich 886 (2012). There, the Court of Appeals held that, notwithstanding a grant of authority in a shareholder agreement to engage in certain conduct, such conduct can still be deemed oppressive and unlawful and the agreement does not *ipso facto* insulate the defendants. In pertinent part, the Court held: "*We disagree with defendants' argument that the trial court erred in finding that they engaged in willfully unfair and oppressive conduct because their conduct was authorized by the corporation's bylaws.* Although the bylaws gave defendants the general

E. The Statute of Limitations is Six Years for Plaintiffs' Buy-Out Claim

a) The Legislature's Careful Placement of the Shortened Limitations Period in Subsection (1)(e) Confirms that it Only Applies Only to the Damages Remedy, And Not the Other Remedies

While Defendants attempt to bar Plaintiffs' damages claim under MCL 450.4515(1)(e) by arguing that it accrued in 2009, despite there being no damages until 2012, Defendants ignore the fact that, even assuming that accrual occurred in 2009, Plaintiffs' claims for equitable relief under MCL 450.4515(1)(a)-(d), including a buy-out of shares at fair value, carry a six-year statute of limitations. First, by its express terms, MCL 450.4515(1)(e) only applies to "[a]n action seeking an award of damages" under subsection (e).

Second, in *Estes v IDEA Engineering & Fabricating, Inc*, 250 Mich App 270, 285; 649 NW2d 84 (2002), the Court of Appeals decided this issue: "we hold that § 489 creates a separate and independent statutory cause of action and that the six year period of limitation contained in the residual statute applies." The Court noted that the shortened limitations period for a damages claim *only* applies to the *damages* remedy. *Id* at 284 n 9 ("As a result of the 2001 Amendments, section 489 contains an express limitations period for damages claims under a cause of action *under that section*.") (emphasis added). *See also Wojcik v McNish*, 2006 WL 2061499, at *4 (Mich App July 25, 2006) ("MCL 450.1489, § 489 of the Michigan Business Corporation Act (MBCA) creates a cause of action to which the residual six-year limitation period of MCL

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authority to make business decisions such as setting salaries, issuing capital calls, or approving rental payments, that does not mean that defendants were permitted to act in a manner that was willfully unfair and oppressive to plaintiff, as minority shareholder. *The exception in MCL 450.1489(3) cannot be read as permitting willfully unfair and oppressive conduct under the guise of defendants' general authority to run and manage IPAX.*" (Emphasis added). *Id.* at * 12-13. Accordingly, even if the Defendants had complied with a valid and enforceable Fifth Operating Agreement, which they did not, compliance with an operating agreement is not an automatic defense under the statute, where the conduct is willfully unfair and oppressive.

600.5813 applies.").[25]

Third, according to this Court, a buy-out claim under subsection (d) of the oppression statute is equitable relief and is not damages. See *Madugula*, 496 Mich at 713 ("Although the final result of a forced buyout under § 489(1)(e) is a payment of money, the relief . . . has long been considered equitable in nature.").

Meanwhile, suppose that Plaintiffs' request for damages under MCL 450.4515(1)(e) were somehow subsumed into Plaintiffs' request for a buy-out under MCL 450.4515(1)(d) for statute of limitations purposes, as Defendants suggest (which would, thereby, and inexplicably, render the "accrual" language and separate statute of limitations for "damages" nugatory). Even then, Plaintiffs' request for damages would then benefit from the six-year residual statute of limitations that is applicable to equitable relief under the oppression statute anyway.

The construction and legislative history of MCL 450.4515 (and the analogous MCL 450.1489) supports Plaintiffs' interpretation. As the member oppression statute was originally drafted, it did not contain any period of limitations in which a claim could be brought. However,

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[25] Defendants allege that the Court of Appeals, in *Irish v Natural Gas*, 2006 WL 2000132 (Mich App 2006), noted that the language in *Estes* was mooted by the Legislature in 2001. The *Irish* Court found no such thing:

> Under *Estes*…this Court held that the residual catch-all, six year limitation period in MCL 600.5813 applies to claims under MCL 450.1489. However, in 2001 PA 57, the Legislature added MCL 450.1489(1)(f) that provides a three-year limitation period from accrual and a two-year limitation period from discovery for claims requesting damages. ***But, as plaintiff argues, the amendment did not specifically address the limitation period for claims seeking equitable relief. Accordingly, the residual six-year limitation period in MCL 600.5813 presumably applies to plaintiff's claim insofar as he requests equitable relief instead of damages.***

Id. In other words, the *Irish* Court was merely explaining that the residual catch-all, six year limitation period in MCL 600.5813 no longer applies to damages; however, the Court confirmed that the six year limitation still applied to equitable relief. The Court ultimately held that MCL 600.5813 did not assist the plaintiff because, according to the Court, a buy-out is an award for damages, but as explained below, this Court in *Madugula* later found that a buy-out is, indeed, an equitable remedy.

in 2002, the Legislature amended the statute to include a period of limitations, but limited its application to the damages remedy. Specifically, the Legislature positioned this language in the second sentence of subsection (1)(e), which is the fifth of six available remedies enumerated in the statute, as follows:

> (e) An award of damages to the limited liability company or to the member. An action seeking an award of damages must be commenced within 3 years after the cause of action under this section has accrued or within 2 years after the member discovers or reasonably should have discovered the cause of action under this section, whichever occurs first.

Notably, and it must be presumed intentionally, the Legislature did not place this language in the preamble to the enumerated remedies, nor did it apply it to any of the other remedies. Had it intended it to apply to any remedy other than damages, it would have been very easy to provide as such – but it did not do this. As this Court explained in *Madugula* regarding 450.1489:

> Section 489 is nearly identical in form to its predecessor, former MCL 450.1825 (§ 825), which was considered equitable in nature and was correspondingly tried to a court. Like § 489, § 825 enumerated a nonexhaustive list of various forms of equitable relief that a court could award. Section 825, however, ***made no mention of damages***. When, in 1989, the Legislature replaced § 825 with § 489, ***damages were added*** to the nonexhaustive list of relief specified in the statute.

Madugula, 853 N.W.2d at 84-85.

Had the Legislature intended to limit the time in which to bring an oppression claim *carte blanche* as to all of the remedies enumerated in MCL 450.4515, it would not have segregated the limiting language to subsection (1)(e), as to damages only. Rather, it would have applied it to all of the remedies, including the buy-out remedy.

Plaintiffs' interpretation of MCL 450.4515(1)(e) as applying solely to a claim for monetary damages is confirmed by Michigan Corporation Law and Practice, § 4.22:

> The 2001 Amendments [to MCL 450.1489] added a ***statute of limitations*** for ***monetary relief*** to section 489…[T]he period for actions for damages under section 489 is three years after the cause of action under the section accrued or two years after the shareholder discovers or reasonably should have discovered

> the cause of action, whichever occurs first. ***For all other relief under that section, general principles apply and the limitations period would be six years***.[26]
>
> […]
>
> In 2002, amendments paralleling the 2001 Amendments to section 489, including the addition of a ***statute of limitations*** for an action ***seeking monetary damages***, were made in section 515 of the Limited Liability Act.

Id. (Emphasis Added.)

It is well established that, "[i]n construing a statute, this Court should presume that every word has some meaning and should avoid any construction that would render a statute, or any part of it, surplusage or nugatory." *Id.* at 280, citing *Altman v Meridian Twp*, 439 Mich 623, 635; 487 NW2d 155 (1992). Further, "[a]s far as possible, effect should be given to every phrase, clause, and word." *Id.* at 280, citing *Gebhardt v O'Rourke*, 444 Mich 535, 542; 510 NW2d 900 (1994). "A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Empire Iron Mine Partnership v Orhanen Eyeglasses*, 455 Mich 410, 423; 565 NW2d 844 (1997).

Thus, by its express terms, MCL 450.4515(1)(e) only shortens the time period within which a member oppression action can be brought *as to the damages remedy*. Thus, it cannot logically be concluded that this limitations period applies to subsection (1)(d), for a buy-out at "fair value," which Plaintiffs have sought in this case. To hold otherwise would be to abrogate the plain language and legislative intent behind the amendment.

Indeed, Defendants concede that a buy-out is an equitable remedy. (*See Defs' Brief*, p 17:

[26] "The *Baks* panel held that equitable tolling was not available under section 541a(4) and, presumably, the same reasoning would apply to the limitations period expressed in section 489(1)(f). In *Techner v. Greenberg*, the federal court of appeals disagreed with *Baks* and held that the three-year period in the Limited Liability Company Act equivalent of section 489 was a statute of limitations, not a statute of repose, and therefore, equitable principles may extend the period." Michigan Corporation Law and Practice, § 4.22.

"These are all equitable remedies, including buy-outs and damages."). Confusingly, Defendants then argue that "a buy-out is a damage remedy," admitting that "ePrize finds no published authority for this common-sense proposition…" *Id.* Instead, Defendants cite to a 2006 unpublished Court of Appeals opinion. *Irish v Natural Gas*, 2006 WL 2000132 (Mich App 2006). However, precedent from this Court clarifies that a buy-out is, indeed, an equitable remedy. See *Madugula*, 496 Mich at 713 ("Although the final result of a forced buyout under § 489(1)(e) is a payment of money, the relief . . . has long been considered equitable in nature." "Because of the equitable nature of Madugula's claim, the case should have been tried at a bench trial. In addition, the trial court erred by allowing the jury to consider the ***purely equitable remedy of a forced buyout of stock***.") (Emphasis added).[27]

b) The Holding of a Special Panel of the Court of Appeals in *Estes v IDEA Engineering* Establishes that the Six Year Period of Limitations Applies to All Remedies Other Than Damages

Almost simultaneous with the aforementioned legislative amendment, in 2002, the Court of Appeals convened a special panel in *Estes v IDEA Engineering*, *supra*, to determine the appropriate statute of limitations to be applied in an oppression claim under MCL 450.1489.[28] The *Estes* special panel was convened in response to the 1998 decision in *Baks v Maroun*, *supra*, in which the Court of Appeals held that a 1489 oppression claim was time-barred because it was

[27] Defendants allege that Plaintiffs are attempting: "to separate damages from all the other remedies…and say 'Well, the rest of the remedies may be time-barred, but not damages-the clock only started on that one in 2012.'" However, Plaintiffs have argued no such thing. The statute *itself* separates a request for damages from the remaining remedies, and provides a specific statute of limitations for a damages remedy *only*.

[28] Again, MCL 450.1489 is the Michigan Business Corporation Act ("MBCA") equivalent to MCL 450.4515 of the Michigan Limited Liability Company Act ("MLLCA"), as they both establish the oppression action in each respective context. Also, as discussed below, MCL 450.1541a is essentially the MCBA equivalent to MCL 450.4404 of the MCLLA, as both of these statutes define certain standards of care and provide for a shortened 2-3 year statute of limitations for breaches thereof. Accordingly, these corollary statutes are referred to interchangeably for purposes of the analysis in this section and the application of the holding in *Estes*, *supra*, to the facts of the instant case.

brought outside of the two year limitations period contained in MCL 450.1541a. As the *Estes* Court explained, the *Baks* Court had "borrowed" the Section 1541a limitations period on the basis that Section 1489 did not create its own cause of action, and, therefore, the 1541a limitations period must apply. *Id.* at 272. However, the *Estes* special panel unanimously rejected this holding and abrogated *Baks* in this regard, holding that "§ 489 does create a cause of action and, accordingly, that the residual six-year limitation period applies to this case." *Id.* at 272.

While *Estes* was pending, the Legislature amended Section 1489 in 2001 to add the same limitations period that is set forth in Section 1541a. However, it included the language only in subsection 1489(1)(f), which, like subsection 4515(1)(e), codifies the oppression damages remedy. Although the amendment did not retroactively apply to the *Estes* plaintiff's claims, and was therefore not relevant to the analysis, the Court of Appeals was cognizant of it and articulated that it would only apply to a damages claim. In this regard, the Court noted, in footnote 9 of its Opinion, that, "[a]s a result of the 2001 Amendments, section 489 contains an express limitations period for *damage* claims under a cause of action under that section." (Emphasis in original). *Id*. at pg. 284, fn 9 citing *Amicus Curiae* Brief of Corporate Law Committee of the Business Law Section of the State Bar of Michigan. The Court's acknowledgment of the amendment is appropriately limited to the damages remedy, as it must be, given the placement of the language in the statute.

If the Legislature had intended the shortened limitations period to apply to all remedies under MCL 450.4515, it would not have placed the relevant language only in one specific subsection that is restricted to actions for money damages. Therefore, even assuming *arguendo* that the claims accrued in 2009, the shortened limitations period in Section 4515 can only apply

to the damages remedy, and not the buy-out remedy; and the buy-out claim must therefore go forward notwithstanding the resolution of the accrual question.

F. Defendants' Fraudulent Concealment Would Toll the Statute of Limitations

Even if Plaintiffs' claims accrued in 2009, which they did not, Defendants' fraudulent concealment would operate to toll the limitations period under MCL 450.4515(1)(e). MCL 600.5855 provides an independent basis for tolling "[i]f a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim."

Because, as discussed in detail below, MCL 450.4515(1)(e) is a statute of limitations, fraudulent concealment under MCL 600.5855 may operate to prevent "accrual" from happening until the cause of action was known to Plaintiffs. This was not until 2012, when Plaintiffs learned they were diluted. See *Sills v Oakland Gen Hosp*, 220 Mich App 303, 308-310 (1996); *Techner v Greenberg*, 553 F App'x 495, 507 (6th Cir 2014) (Because MCL 450.4515(1)(e) is "properly . . . classified as [a] true statute[] of limitations, equitable principles may be applied to extend the period during which Techner's claims for breach of fiduciary duty could be filed.").

Meanwhile, "unlike the requirement for the general application of Michigan's fraudulent-concealment statute, the statute's relevance in breach-of-fiduciary duty cases is not constrained by the necessity of establishing an affirmative act by the defendant[.]" *Techner*, 553 F App'x at 507. There is instead "an affirmative duty to disclose where the parties are in a fiduciary relationship." *Id.*, citing *Lumber Village, Inc v Siegler*, 135 Mich App 685, 695; 355 NW2d 654 (1984). With regard to each Defendant-fiduciary, "his silence when he ought to speak, or his failure to disclose what he ought to disclose, is as much a fraud as an actual affirmative false representation." *Barrett v Breault*, 275 Mich 482 (1936). As in *Techner,* the defendant "was required to disclose . . . that proper distributions were not being made," and "because the

defendant concealed the improper actions of the limited liability company's managers," MCL 600.5855 allows plaintiff "two years from the . . . uncovering of the defendant's malfeasance to file suit." *Supra* at 507.

Defendants' reliance on *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378; 738 NW2d 664 (2007), and its abrogation of the *common law* discovery rule is perplexing. The basis for the holding in *Trentadue* was that a comprehensive *statutory* scheme was already in place (including MCL 600.5855, which the Court noted "provides for essentially unlimited tolling based on discovery when a claim is fraudulently concealed"), to govern tolling for civil cases. *Id.* at 388-393. Defendants refute an issue (the common law discovery rule) that Plaintiffs nowhere advance.

G. Defendants' "Concerns" Are Unfounded

Defendants rely on alarmist pleas attempting to avoid the import of the law as applied to the facts in this case. Defendants suggest that the Court of Appeals' decision results in some kind of "per se" rule that the potential liability of companies in this situation will linger indefinitely until liquidation of the company. (*Defs' Brf,* pp 24-25). First, fundamentally, Defendants are mischaracterizing the nature of the Court of Appeals' ruling. For example, in any variety of contexts, a potential wrongdoer or tortfeasor might take a particular action precedent to committing a tort, but the tort action does not start accruing until the tortfeasor has actually inflicted the harm and damages. Certainly, a statute of limitations should not be drastically shortened based on some precedent act, to avoid the potential action lingering indefinitely – but that is what Defendants' theory suggests.

Second, neither Plaintiffs' position nor the Court of Appeals' decision in this case has suggested that a liquidation event is required to trigger accrual of a member oppression claim in all potential dilution cases. Oppression cases are inherently fact specific. Indeed, under the

specific facts before this Court and the nuances of the continuing course of conduct giving rise to the member oppression claim here, the liquidation and egregious distribution in 2012 is the action that triggered accrual of Plaintiffs' member oppression claim in this particular case. The shareholder and member oppression statutes are designed to provide "unique" relief for shareholders or members of closely held companies, who are owed the strictest of fiduciary duties by those in control of the corporation. *Estes*, 250 Mich App at 280-281 (2002). Indeed, the statute is to be "liberally construed . . . to give special recognition to the legitimate needs of close corporations." MCL 450.1103(c). Further, this Court has held that "the Legislature provided the circuit court wide discretion" in deciding an oppression case. *Madugula v Taub*, 496 Mich 685, 702; 853 NW2d 75 (2014). These legal principles reflect the unique nuances of individual oppression cases, and demonstrate the weakness of Defendants' alarmist suggestions about the impact of the Court of Appeals' decision in this case. Under the specific facts of this case, Plaintiffs' oppression claim accrued upon the occurrences in 2012.

Notably, it is the Defendants who suggest a providentially unwise precedent. Under Defendants' theory, controlling shareholders would be free to adopt a secret agreement diluting the non-controlling shareholders' shares upon a future sale, and as long as the future sale is outside of the repose period, the controlling shareholders would entirely avoid liability while the non-controlling shareholders would be prevented from ever bringing an action to enforce their rights. This is not only inconsistent with MCL 450.4515, it is bad policy and creates a disincentive in original investors and employees involved in helping to build a company from the ground up.

CONCLUSION AND RELIEF REQUESTED

For all of the foregoing reasons, and for all of those set forth in the published Opinion of the Court of Appeals, Plaintiffs request that this Court affirm the Opinion of the Court of

Appeals, and remand this case to the trial court for discovery and trial.

Respectfully submitted,

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